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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 137

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Since this case involves a direct and recognized conflict of decisions between the court below and the Court of Claims and the issues involved are recurrent, the United States does not oppose granting the petition for a writ of certiorari.

1. This litigation involves the interpretation of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U.S.C. App. 1735–1746, and of the standard-form charter agreements executed by the United States Maritime Commission under the Act. The Merchant Ship Sales Act was adopted for the purpose of authorizing the sale of merchant vessels constructed for the government during World War II. The Act

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also empowered the Commission to charter such vessels for bareboat use. However, Section 7 of the Act, 50 U.S.C. App. 1740, specifically stipulated that applications to purchase vessels shall be preferred over applications to charter them. "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership," Congress directed the Commission "not to approve applications to charter unless such chartering is consistent with the policies of the act." S. Rep. No. 807, 79th Cong., 1st Sess., p. 13; see Section 5(a) of the Act, 50 U.S.C. App. 1738(a).

With respect to the chartering of vessels, Section 5(b) of the Act directed the Commission to fix the charter hire at such rate as the Commission determines to be consistent with the policies of the Act. That rate, the Section states, "shall not be less than 15 per centum per annum of the statutory sales price," except upon the affirmative vote of not less than four members of the Commission, and not less than the prevailing world market charter rate for similar vessels for similar use. In addition, Section 5(c) referred to several provisions of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1198–1200, 1202, 1203, including Section 709(a) which stipulates that every charter shall provide that "whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits * * * shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over

to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum * * *."

Thereafter, the Commission approved the use of a standard-form charter agreement, and petitioners entered into such a charter agreement with the Commission during 1946. The contract required the payment of a "Basic Charter Hire" fixed at a flat rate of 15 percent per annum of the statutory sales price, *i.e.*, the minimum rate prescribed by Section 5(b) of the Act. It also provided for the payment of "Additional Charter Hire" in the event that the charterer realized excess profits—that is, "[i]f at the end of the calendar year * * * the cumulative net voyage profit * * * shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the [chartered vessels]." The additional charter hire required by the agreement, was not limited to a fixed 50 percent of the excess profits; rather, it was to be computed on the basis of a sliding scale of 50, 75, and 90 percent.[1]

[1] The charter agreement with the shipper provided:

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day."

Petitioners' operations resulted in cumulative net voyage profits in excess of $100 per day. Therefore, under the charter agreement they were obligated to pay, and did in fact pay, to the government "additional charter hire" computed at 75 and 90 percent of the excess profits. By this action, petitioners seek to recover that portion of these payments which exceeded the 50 percent "additional charter hire" provided in Section 709(a). They claim (Pet. 11–18) that the "Additional Charter Hire ' clause was inserted in the agreement pursuant to Section 709(a), and that this Section limits the amount of the additional charter hire to 50 percent of the excess profits.

The government submits, on the other hand, that both courts below correctly concluded that the Commission had authority under Section 5(b) of the Merchant Ship Sales Act of 1946—which grants the Commission authority to fix the charter hire at such rate as it determines to be consistent with the policies of the Act—to insert into charters an "Additional Charter Hire" clause requiring the payment of more than 50 percent of the excess profits. The resolution of this question depends upon whether Section 709(a) of the Merchant Marine Act of 1936, which is made applicable under the 1946 Act and which provides for additional charter hire of 50 percent of excess profits, was intended to limit the additional charter hire which the Commission could require. We believe that Section 5(b), which was passed after Section 709(a), allows, in plain terms, the fixing of a rate above that

provided by Section 709(a). The reference to Section 709(a), in our view, was not intended to curtail the authority of the Commission to negotiate a higher rate, [redacted] but only to make it plain that the Commission must recapture at least 50 percent. This construction is consistent with the policy underlying the 1946 Act. As the court of appeals held (Pet. App. A, p. 13), the "dominant purpose of the 1946 Act was to sell vessels, not to charter them"; accordingly, "the important consideration was to avoid making charters too cheap." Thus, it may not be properly assumed that Congress intended to fix absolute rates which the Commission could not vary regardless of the amount of profit charterers were earning.

The Court of Claims, contrary to the court below, has held (one judge dissenting) that the crucial issue is whether the "Additional Charter Hire" clause of the agreement was in fact adopted under Section 709(a) or under Section 5(b). *American Export Lines, Inc.* v. *United States*, 290 F. 2d 925. Since it determined that the clause was adopted under Section 709(a) and that that Section, standing by itself, only authorized the Commission to contract for 50 percent of the excess profits, the Court of Claims concluded that the Commission had no authority to charge any amount as additional charter hire in excess of 50 percent. Accord, *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D. N.Y.); *American Mail Line, Ltd.* v. *United States*, 213 F. Supp.

152 (W.D. Wash.); cf. *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245 (S.D. N.Y.).[2]

While we think the decision below is correct, we nevertheless do not oppose the granting of certiorari on this issue. The Court of Claims' decision is in square conflict with the holding below. Indeed, the court below explicitly rejected the *American Export Lines* case as a "recondite technicality." It further stated that there was no way to ascertain whether the "Additional Charter Hire" clause was adopted under Section 5(b) or Section 709(a) and that, in any event, the clause was valid so long as Congress somewhere conferred authority to adopt it (Pet. App. A, pp. 6–7).

Apart from the conflict in decisions, the question is of recurring importance. Including the instant case, there are 36 suits pending against the United States involving the legality of the "Additional Charter Hire" clause. The total amount claimed in these suits exceeds fourteen million dollars. In addition, the United States has filed 38 claims, either by way of cross libel or by institution of a separate suit based

[2] Having determined that the additional charter hire clause was inserted into the contract under Section 709(a), the Court of Claims did not reach the question whether Section 5(b) authorized the Commission to contract for more than 50 percent of the excess profits. It did note, however, that "[i]t may be the charter could have provided [for the payment of the additional charter hire under Section 5(b)] * * * but the fact is it did not so provide." 299 F. 2d at 931. The district court in *Dichman* went further and conceded that the higher rates could have legally been imposed under Section 5(b) had the Commission in fact chosen to base its rates on that Section. 144 F. Supp. at 926.

on the "Additional Charter Hire Clause." These cases involve approximately six million dollars. The United States also contemplates the filing of several additional suits.

2. The charter also contained a clause permitting either the Commission or the charterer to terminate the period of use of any of the vessels by giving at least fifteen days' written notice to the other party. The clause further provided that the agreement could be terminated, modified, or amended at any time by mutual consent. On August 15, 1947, the Commission sent to petitioners and other charterers a telegram stating that the use of any and all vessels chartered to their respective companies pursuant to the provisions of the standard-form charter agreement would be terminated after fifteen days. On August 20, 1947, the Commission sent petitioners and other charterers a telegram advising that the charters would not be terminated if the parties agreed to a proposed addendum. Petitioners agreed to the addendum, which provided in pertinent part that the additional charter hire (computed on the basis of profits above 15 percent of the statutory sales price) would thereafter be computed, accounted for, and paid separately for voyages which were subject to the terms of the addendum. While petitioners made excess profits and therefore paid additional charter hire on voyages prior to the addendum, petitioners sustained losses from their operations during 1947 after the charter agreement was amended.

Petitioners challenge the legality of the addendum on the ground that its effect was to divide the calen-

dar year 1947 into two parts for purposes of profit-sharing computations under the "Additional Charter Hire" clause of the agreement. They argue that this is inconsistent with Section 709(a) of the 1936 Act which prescribes "calendar year" accounting of profits. Therefore, they conclude, the cumulative net voyage profits earned prior to the addendum should be reduced by the losses sustained thereafter in 1947 for purposes of accounting in paying the "Additional Charter Hire" for that year.

The court of appeals sustained the legality of the addendum to the agreement. It based its conclusion upon the fact that the charter agreement expressly provided that it could be terminated for any or no reason by either party on fifteen days' notice. It was therefore clearly proper for the Commission to decide to terminate the agreement unless the charterer accepted modification of the agreement. Furthermore, as we have shown above, the Commission's authority to require the "Additional Charter Hire" clause stems from Section 5(b) of the 1946 Act, not Section 709(a).

While there is no conflict on this issue, we do not oppose the suggestion that it be reviewed. For the resolution of this issue, like the resolution of the first issue discussed above (see *supra*, pp. 1–7), depends on whether Section 709(a) or Section 5(b) is controlling. If the Court grants certiorari on the first issue, we believe that it would be appropriate to consider this related issue at the same time. Moreover, a considerable number of the pending cases involving the first issue (see *supra*, pp. 6–7) also involve the addendum.

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JUNE 1963.

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